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IN THE

Supreme Court of the United States

October Term, 1979

No. 79-1767

WILMINGTON UNITED NEIGHBORHOODS, et al.,
Petitioners,

v.

U. S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF OF RESPONDENT WILMINGTON MEDICAL CENTER, INCORPORATED IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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OPINIONS BELOW.

The opinion of the Court of Appeals for the Third Circuit (Appendix A to the Petition) is reported at 615 F. 2d 112. The opinion of the District Court for the District of Delaware (Appendix B to the Petition) is reported at 458 F. Supp. 628.

JURISDICTION.

The judgment of which review is sought was entered on February 6, 1980. Jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTIONS PRESENTED.

The questions presented, as framed in the Petition, are:

1. Whether a statutory provision precluding judicial review of determinations by a federal official precludes review of allegations of corruption against that official.

2. Whether there is judicial review of the actions of State agencies in interpreting and applying the standards and criteria set forth in a federal statute and its implementing regulations, where the federal statute does not expressly preclude such review.

STATUTE AND REGULATIONS INVOLVED.

The statute and regulations involved in this matter are Section 1122 of the Social Security Act (42 U. S. C. § 1320a-1 et seq.) and its implementing regulation (42 C. F. R. §§ 100.101-100.109). The statute and regulations are set forth, in part, in Appendix C to the Petition.

COUNTERSTATEMENT OF THE CASE.

This action relates to the approval under Section 1122 of the Social Security Act, 42 U. S. C. § 1320a-1 ("Section 1122") by the Secretary (the "Secretary") of the United States Department of Health, Education and Welfare ("HEW") and the appropriate State agencies of the

plan of the Wilmington Medical Center, Incorporated ("WMC") to relocate certain of its hospital facilities and to renovate others ("Plan Omega").

In March, 1976, WMC sought approval of Plan Omega pursuant to Section 1122. (6a).[1] As required, WMC's application for approval was submitted to the Delaware Bureau of Comprehensive Health Planning (the "DPA") and to local planning agencies, each of which certified the Plan as necessary. (6a). The approval of the DPA was forwarded to the Secretary, who then issued the Section 1122 approval of Plan Omega in August, 1976. (7a). This approval guaranteed that the Secretary would not withhold the capital reimbursement portion of WMC's charges to patients under federal programs on the ground that Plan Omega was an unnecessary capital expenditure. (7a).

Thereafter, in September, 1976, an action was filed in the United States District Court for the District of Delaware by certain plaintiffs, including Wilmington United Neighborhoods, one of the plaintiffs herein, challenging Plan Omega as violating Title VI of the Civil Rights Act of 1964 (42 U. S. C. § 2000d) ("Title VI"), Section 504 of the Rehabilitation Act of 1973 (29 U. S. C. § 794) ("Section 504"), and the Environmental Impact Statement requirements of the National Environmental Policy Act of 1969 (42 U. S. C. § 4332(a)). (4a, 40a, 48a). In *NAACP v. Wilmington Medical Center, Inc.*, 436 F. Supp. 1194 (D. Del. 1977) *aff'd* 584 F. 2d 619 (3d Cir. 1978), the plaintiff's claim under the National Environmental Policy Act of 1969 was rejected; the court holding that the duties of the Secretary with respect to approving Plan Omega under Section 1122 were not major federal

1. References to the Appendix to the Petition for Certiorari filed by plaintiffs will be designated in parenthesis with a page number followed by the letter "a", e.g., "(2a)."

action and thus did not require the preparation of an environmental impact statement.

In *NAACP v. Wilmington Medical Center, Inc.*, 453 F. Supp. 280 (D. Del. 1977), the Delaware District Court, on cross-motions for summary judgment, rejected plaintiff's challenge to Plan Omega under Title VI and Section 504. In particular, the District Court found that HEW did not act arbitrarily and capriciously in finding, after a massive administrative investigation, that Plan Omega, as modified to include certain civil rights assurances, was in compliance with Title VI and Section 504. The District Court also found that plaintiffs had no private right of action under Title VI and Section 504.

In *NAACP v. Wilmington Medical Center, Inc.*, 599 F. 2d 1247 (3d Cir. 1979), the Court of Appeals for the Third Circuit reversed the District Court's holding that plaintiffs had no right to a private right of action under Title VI and Section 504. The matter was remanded to the District Court for a trial *de novo* of plaintiff's Title VI and Section 504 claims against WMC. On May 13, 1980, the Delaware District Court handed down its post-trial decision, finding against plaintiffs and in favor of WMC on all claims asserted. *NAACP v. Wilmington Medical Center, Inc.*, — F. Supp. — (D. Del. 1980) (slip opinion, No. 76-298, May 13, 1980).

Meanwhile, after waiting nearly the full six months permitted by statute, on February 4, 1977, plaintiffs herein filed a request for reconsideration of the Secretary's August 6, 1976 Section 1122 approval of Plan Omega. (7a-8a). As plaintiffs concede, this request included a request that the Secretary consider allegations that the DPA had violated or ignored the standards set forth in applicable regulations and the state health plan. (Pet. 6).[2] The response

2. References to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit herein will be designated as "Pet. —".)

to plaintiff's request for reconsideration, and the supplements thereto, was issued by HEW on September 7, 1977, over the signature of Dr. Harold Margulies, Acting Administrator of the Health Resources Administration of the Department of Health, Education and Welfare. (50a). The response indicated, *inter alia*, that (1) the DPA's review in this case was consistent with the requirements of Section 1122; (2) the Secretary is not authorized to make an independent finding as to the consistency of the proposed capital expenditure with applicable standards, criteria and plans; and (3) if the Wilmington Medical Center makes a capital expenditure which is different from that approved by the DPA, it may be subject to the withholding of reimbursement. (J. A. 83-90).[3]

Believing that the last mentioned finding was in need of clarification, the Acting Administrator issued a letter on October 12, 1977, in which paragraph 5 of his September 7, 1977, letter was revised. (J. A. 91-94). The revised paragraph made it clear that WMC risked losing reimbursement under Section 1122 for any changes in Plan Omega, which changes themselves constituted "capital expenditures" as that term is defined in the Section 1122 regulations. This revision concerning the possible effect of compliance by WMC with the conditions necessary to bring Plan Omega into compliance with Title VI and Section 504 made it clear that on reconsideration HEW had made its findings consistent with the Section 1122 regulations and in particular with 42 C. F. R. § 100.103(a)(2)(v).

On September 30, 1977, the Secretary apparently received a letter in support of Plan Omega from Irving Shapiro, the chairman of the board of the Dupont Company. This letter was three sentences in length. (13a).

3. References to the Joint Appendix filed in the Court of Appeals are designated herein as ("J. A. —").

According to plaintiffs, the letter had placed upon it a "Priority" stamp and directions that it be routed to certain officials in the Office of Civil Rights of HEW and in HEW's Philadelphia regional office. (Pet. 10). Notably, there is no contention by plaintiffs that the letter was routed to Dr. Margulies, the author of the October 12, 1977, clarification letter about which plaintiffs complain.

In contrast to the single letter from a proponent of Plan Omega, opponents of the Plan, including plaintiffs, took much more direct action. For instance, on December 5, 1977, 90 persons under the aegis of Wilmington United Neighborhoods conducted an hour long demonstration at the office of the Secretary, attended a meeting with the Undersecretary of HEW and attended a meeting with the staff of the Congressional Black Caucus (Docket No. 27, Appendix G at ¶ 4).[4] The purpose of this demonstration and these meetings was admittedly to influence the Secretary's Section 1122 determination with respect to Plan Omega. (*Id.* at ¶ 5). Interestingly, plaintiffs' attorneys, the same attorneys who now complain of administrative decisions "reached as a result of improper influences which corrupted the decision-making process" (Pet. 15-16), arranged the meeting with the Congressional Black Caucus, a meeting with the avowed purpose of having the Black Caucus write a protest to the Secretary and arrange for a Congressional oversight hearing. (*Id.* at ¶ 7). Of course, other plaintiffs elected to avail themselves of the same approach utilized by Mr. Shapiro and wrote letters protesting the Section 1122 approval of Plan Omega to both HEW and the DPA. (Docket No. 27 and exhibits thereto).

On November 11, 1977, plaintiffs commenced this action, alleging causes of action against HEW, the DPA

4. References to the record in the United States District Court for the District of Delaware herein are designated ("Docket No. —").

and two subordinate state and local planning agencies. In December, 1977, plaintiffs amended their Complaint as a matter of right, pursuant to Rule 15(a) of the Federal Rules of Civil Procedure, to add WMC as a party defendant and to assert claims against WMC.

In January, 1978, WMC, HEW and the DPA each moved to dismiss the Complaint. (J. A. 50A, 51, 36). Plaintiffs filed cross motions for summary judgment. (J. A. 99, 249). All parties, including plaintiffs, engaged in discovery. (Docket Nos. 11, 22, 24, 25, 26, 27, 35, 36, 38, 53, 63). After the various motions had been fully briefed and argued, the District Court on September 22, 1978, granted summary judgment in favor of all defendants and against plaintiff on all claims asserted against defendant in this action. (107a-113a).

On appeal, the Court of Appeals for the Third Circuit affirmed the decision of the District Court on all issues. (1a-33a). Judge Adams dissented on the issue of whether federal jurisdiction to adjudicate claims against the DPA was precluded by Section 1122(f). (22a, 33a).

In their petition, plaintiffs raise two questions: (1) whether an allegation of improper influence is sufficient to overcome a clear statutory preclusion of judicial review and (2) whether there can be judicial review of the decision of the DPA in the light of Section 1122(f), its purpose and its legislative history.

As is evident from their respective decisions, both the District Court and the Court of Appeals properly considered the applicable case law, including the relevant decisions of this Court, and found that judicial review of plaintiffs' claims in this case was barred. These decisions are consonant with the standards set down by this Court and the decision of the Court of Appeals is not in conflict with decisions by other courts of appeals on the relevant issues.

ARGUMENT.

The Decision Below Is Clearly Correct and in Harmony With Relevant Decisions of This Court.

The decision below was reached after careful consideration of relevant decisions of this Court and the holding that Section 1122(f) precludes judicial review of plaintiffs' claims is clearly correct. Plaintiffs' argument to the contrary is specious.

Plaintiffs initially attack the Secretary's decision on reconsideration as having been "a result of improper influences which corrupted the decision-making process" and, therefore, as not having been made under the statute. (Pet. 15-16). By so directing their attack, they seek to avoid the clear preclusion of judicial review contained in Section 1122(f). This is similar to the approach attempted and found wanting in *Briscoe v. Bell*, 432 U. S. 404 (1977), which has not been cited in the Petition.

In *Briscoe*, as in this case, the statute in question "could hardly prohibit review in more explicit terms." *Briscoe v. Bell, supra* at 409. In *Briscoe*, the District Court had ruled that the preclusion of judicial review in Section 4(b) of the Voting Rights Act of 1965 (42 U. S. C. § 1973b) did not extend to the "pure legal question" of whether officials had correctly interpreted the Act. The Court of Appeals also considered the preclusion question and found that, even where Congress intended to preclude judicial review, "limited jurisdiction exists to review actions which on their face are plainly in excess of statutory authority." *Briscoe v. Levi*, 535 F. 2d 1259, 1265 (D. C. Circuit 1976), quoted in *Briscoe v. Bell, supra* at 408. The Supreme Court rejected both of these approaches to evading the clear command of the preclusion statute. The

attempt of plaintiffs herein to give them new life is both factually and legally without merit.

Plaintiffs contend that HEW "reversed" its earlier decision that WMC's compliance with civil rights assurances would require it to undergo an entirely new Section 1122 review of Plan Omega (Pet. 10) on the basis of influence by "a powerful economic and political figure." (Pet. 22). Thus, they contend that the HEW decision was not made under the statute. This claim is wholly without basis. In the language of the District Court (69a-70a), as quoted by the Court of Appeals:

> "As the October 12 letter to plaintiffs' counsel illustrates, however, the Secretary based his decision on his interpretation of the statute and the regulations implementing it. The fact that HEW apparently had reached a contrary conclusion only a month earlier, or that the interpretation may be erroneous as a matter of law, or that the Secretary's decision may have been influenced by a letter from a business leader and personal friend of the President is irrelevant, because in any of those events section 1122(f) would still preclude judicial review. See *Briscoe v. Bell, supra,* 432 U. S. at 409-15." (14a).

Plaintiffs attempt to save their claim by reliance on *Johnson v. Robinson,* 415 U. S. 361 (1974) and *Weinberger v. Salfi,* 422 U. S. 749 (1975). This reliance is misplaced. In *Johnson v. Robinson, supra,* the court concluded that the particular language of the statute in question did not give any basis for a conclusion that Congress intended to preclude a challenge to the constitutionality of veterans' benefits legislation. Again, in *Weinberger v. Salfi, supra,* the court concluded that Section 405(h) of the Social Security Act (42 U. S. C. § 405(h)) did not

preclude judicial review of constitutional challenges. Rather, it merely required that such challenges be brought under the jurisdictional grants contained in the Act. As was correctly noted by the District Court in this case:

> "None of the defendants have argued that section 1122(f), which bars judicial review of a 'determination by the Secretary under [section 1122]' precludes review of plaintiffs' constitutional claims. Moreover, the Supreme Court has construed similar statutory language as not precluding judicial review of decisions relating to the constitutionality of the underlying statute. *Johnson v. Robinson,* 415 U. S. 361, 366-74 (1974); see *Califano v. Sanders,* 430 U. S. 99, 199 (1977)." (58a at n. 44).

Thus, plaintiffs' constitutional claims in this case were considered and found wanting by both the District Court (98a-106a) and the Court of Appeals (19a-21a). These decisions are fully in keeping with the principles set forth in *Johnson v. Robinson, supra,* and *Weinberger v. Salfi, supra. See Califano v. Sanders,* 430 U. S. 99 (1977).

Plaintiffs do not attempt to raise any constitutional claim herein and their specious claim of undue influence gives no ground for avoiding the clear command of Section 1122(f). Here, as in *Briscoe v. Bell, supra,* the language of the statute is absolute on its face and admits of no exceptions. *See Union Pacific Railway Company v. Sheehan,* 439 U. S. 89 (1978). The decision below that the Secretary's determination on reconsideration is "manifestly unreviewable by the terms of Section 1122(f)" is clearly correct and in harmony with the decisions of this Court.

So, too, is the decision that Section 1122(f) precludes review of the decisions made by the DPA, Plaintiffs' contention to the contrary is without merit.

The applicable law on this question is not in dispute. It is settled that Congress may exercise its power to limit federal jurisdiction in such a way as to preclude judicial review. Furthermore, while evidence of Congressional intent to create such a limitation must be clear and convincing, a clear command of the statute will preclude review. *Abbott Laboratories v. Gardner,* 387 U. S. 136 (1967); *Barlow v. Collins,* 397 U. S. 159 (1970); *Dunlop v. Bachowski,* 421 U. S. 560 (1975).

In the instant case, both of the courts below applied the applicable law and correctly found that the legislative history and statutory purpose of Section 1122 clearly indicated that Congress intended that there be no federal judicial review of decisions by the DPA. Thus, it was found that Section 1122 was intended by Congress to contain hospital costs by denying reimbursement for health care related capital expenditures not deemed necessary by the states and to encourage rational health planning by the states. (15a, 75a). *See NAACP v. Wilmington Medical Center, Inc.,* 584 F. 2d 619, 627-28 (3d Cir. 1978). It was further determined that the legislative history of the statute indicated that Section 1122 was not meant to change in any way "the autonomy or authority of existing State or local planning agencies." H. R. Rep. No. 231, 92d Cong., 2d Sess., *reprinted in* [1972] U. S. Code Cong. & Admin. News 4989, 5066. (16a, 76a).

When the deference to state health planning efforts and HEW's limited role under Section 1122 are viewed in connection with the fact that Section 1122(f) precludes review of the Secretary's decision, it is clear that Congress intended that federal interference, including review by the federal judiciary, with the planning decisions of the states was to be avoided. In language adopted by the Court of Appeals (16a), the District Court correctly reasoned:

> "Given the prohibition on judicial review of the Secretary's decision set forth in Section 1122(f), it is inconceivable that Congress could have intended the Federal judiciary to play a more active role than the Secretary by reviewing under any standard the substance of the DPA's approval of the proposed capital expenditure." (77a).

The courts below correctly found that there was persuasive reason to believe that Congress intended to cut off judicial review of decisions by the DPA under Section 1122. *See Morris v. Gresette,* 432 U. S. 491 (1977). Like most, if not all, preclusion statutes, Section 1122(f) was born out of a legislative desire to streamline the applicable agency process so that costly delays could be avoided.[5] (17a). The time constraints on a health care provider such as WMC make it necessary, as Congress and the Secretary have recognized, to be able to plan its capital expenditures with a reasonable assurance that, once approval by the applicable agencies has been obtained, such planned expenditures may be undertaken with the assurance that capital expenditures will be reimbursed. The threat to this interest created by the possibility of interminable litigation is intolerable. No case could demonstrate more cogently the effect of lengthy litigation upon the orderly planning and administration of capital improvements than the case at bar. WMC has already encountered increased costs which reach into the millions of dollars because of delay created by this litigation. Given

5. The statute and regulations clearly indicate the desire to streamline the 1122 process. Under Section 1122(d)-(1)(B)(i), the Secretary shall disallow reimbursement if the DPA has rejected the proposal for a capital expenditure "within a reasonable period." Pursuant to the applicable regulations, 42 C. F. R. § 100.106(a)(4), the "reasonable period" shall not exceed 90 days. The failure of the DPA to notify the proponent of the capital expenditure of its decision prior to the expiration of 90 days from receipt of the application has the effect of a favorable determination. *Id.*

the clear intent of Congress to provide a process whereby a health care provider might receive early approval of its planned capital expenditure, it is simply illogical to suggest that, where review of the Secretary's determination is not available, every preliminary determination down the line might be subject to such review.

Plaintiffs also contend that Section 1122 is a "federal" program and, therefore, intervention by the federal judiciary is necessary if there is to be uniformity in the interpretation of federal regulations across the country. (Pet. 17-18). In language ignored by plaintiffs, the Court of Appeals correctly rejected this contention, stating:

> "We find these arguments unpersuasive. Statutes precluding judicial review would be rendered meaningless if the federal courts could always intervene in so-called 'federal' programs." (16a).

The Court of Appeals then went on to reject the premise that the Section 1122 program is a "federal" program. Plaintiffs' argument to the contrary is based on the wholly unsupported notion that Section 1122 was meant to be uniformly applied. (Pet. 27). This argument ignores the legislative history of Section 1122, which clearly indicates a Congressional intent to "in no way change the autonomy or authority of existing state or local planning agencies." H. R. Rep. No. 231, 92d Cong., 2d Sess., *reprinted in* [1972] U. S. Code Cong. & Admin. News 4989, 5066. As noted by the Court of Appeals, the autonomy and authority of state and local planning agencies would most surely be changed if the determination of the DPA were reviewable in federal court. (16a).

It is clear that the court below applied the appropriate case law to reach the conclusion that Section 1122(f) pre-

cludes review of determinations of the DPA. The decisions below are fully in harmony with the relevant decisions of this Court and there exist no special or important reasons for granting a writ of certiorari in this case.

Plaintiffs' attempt to argue that the decision of the court below is in conflict with a decision of the Court of Appeals for the Seventh Circuit is totally without merit. *Lakeside Mercy Hospital v. Indiana State Board of Health,* 421 F. Supp. 193 (N. D. Ind.), *aff'd without opinion* 547 F. 2d 1170 (7th Cir. 1976), is a District Court decision which was affirmed without opinion by the Court of Appeals for the Seventh Circuit. The issue of the preclusive effect of Section 1122(f) was not raised by any party in that litigation and the District Court did not consider the issue. In affirming without opinion, the Court of Appeals certainly did not consider the issue and the decision in that case does not conflict with the decision of the court below in this case.

Finally, although the Court of Appeals herein did not find it necessary to discuss the issue, the District Court held that review of plaintiffs' claims against the DPA was barred for yet another reason. Plaintiffs submitted each of their claims against the DPA in their February 4, 1977 request for reconsideration, and supplements thereto.[6] These claims were considered and rejected by the Secretary. As a result, review of these claims is expressly precluded by Section 1122(f). (78a, 79a, 87a-88a).

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6. The District Court found that plaintiffs lacked standing to assert their claim that the DPA breached the Section 1122 agreement between the State of Delaware and HEW by failing to submit copies of comments, reports and findings of the subordinate health planning agencies to HEW at the time the DPA recommended approval of Plan Omega (80a-81a). Plaintiffs did not appeal this holding. (Plaintiffs' Brief below at 6).

CONCLUSION.

The decision below is consistent with this Court's interpretation of federal law and does not conflict with decisions of other courts of appeals. For the reasons set forth herein, it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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